BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAFAELA DE LA TORRE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,004,126
VIA CHRISTI REGIONAL MEDICAL CENTER	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the post award Review And Modification Of An Award issued by Administrative Law Judge Nelsonna Potts Barnes on September 9, 2004. Respondent contends that the original award is excessive and that claimant's award, which was issued August 5, 2003, should be reduced, arguing claimant has not put forth a good faith effort to remain in her vocational training plan or to obtain employment on her own outside of the plan. The Appeals Board (Board) heard oral argument on February 15, 2005.

APPEARANCES

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Review And Modification Of An Award entered by the Administrative Law Judge (ALJ).

ISSUES

Is respondent entitled to a review and modification of an Award issued August 5, 2003, pursuant to the Kansas Workers Compensation Act?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant suffered accidental injury on November 3, 2001, while working for respondent. As a result of that injury, claimant was awarded a 78.5 percent permanent partial general disability. That Award was appealed to the Board, which, in its February 27, 2004 Order, modified the appropriate average weekly wage, but affirmed the remainder of the Award.

As part of the agreement between claimant and respondent, claimant entered into a vocational rehabilitation plan under the guidance of vocational rehabilitation expert Dan Zumalt, wherein claimant would attend ESL and GED training classes. These classes, which began in January of 2003, were originally scheduled to conclude in June of 2003. However, claimant's progress was slower than anticipated, and claimant remained in the classes. However, unbeknownst to Mr. Zumalt or claimant's attorney, claimant stopped going to class after July 16, 2003. This decision by claimant to stop going to class came as a surprise to Mr. Zumalt, who had a consultation with claimant on July 17, 2003. At that time, Mr. Zumalt made note of the fact that claimant was able for the first time to directly converse with Mr. Zumalt without the aid of an interpreter. While he noted her speech was slow, considered and deliberate, it was, however, a big step in claimant's progress towards becoming bilingual. Mr. Zumalt had indicated that once claimant satisfactorily completed the training course in English and passed her GED, she would be capable of making between $6.90 and $13.12 per hour in the open labor market.

However, as claimant terminated her attendance at the training classes, Mr. Zumalt indicated that this would significantly damage claimant's ability to obtain employment in the open labor market.

When asked to explain the reasons for her termination of the class training program, claimant originally advised that she stopped going to class as of August 8, 2003, because of automobile problems. However, it was noted in the record that claimant last attended class on July 16, 2003. The discrepancy between July 16 and August 8 is not explained. Claimant testified that she had to sell her vehicle because it was costing her too much in gasoline and she could not afford insurance on the vehicle. However, it was determined at claimant's discovery deposition that insurance on her vehicle was paid through September 2, 2003. There is no explanation for this discrepancy in dates. Additionally, it was noted that claimant purchased a second vehicle as of August 22, 2003.

Claimant's attorney acknowledged that he was not initially aware that claimant had terminated her attendance at the classes, but, upon being notified, he immediately advised respondent's attorney by letter of the problem and the fact that they were attempting to locate additional transportation. While it is not contained in the record, it was agreed by the attorneys at oral argument that this letter was provided sometime in September

2003. As of October 23, 2003, Mr. Zumalt officially closed the file on claimant, in part, due to claimant's voluntary withdrawal and nonparticipation in the class. In a letter dated October 23, 2003,[1] Mr. Zumalt noted that claimant had attended only 52 percent of her ESL classes and 51 percent of her GED training classes prior to her exiting the program entirely.

Claimant testified that after she left the training program, she began a job search on her own. During the review and modification hearing held April 7, 2004, claimant provided a list of businesses where she had attempted to obtain employment. The list,[2] which contains fifty-seven entries, although some are duplicates, gives no indication as to whether claimant's contact was in person, by telephone or by letter. Additionally, there are no dates indicating when claimant made these contacts. And finally there is no indication in this list as to whether an application was prepared and submitted to the various businesses.

Claimant then testified at her discovery deposition held May 27, 2004. At that time, she submitted an additional list of job contacts, which included five listings.[3] Claimant testified that these were additional contacts made between the April 7, 2004 review and modification hearing and the May 27, 2004 discovery deposition.

The ALJ, in her Award, determined that claimant had put forth a good faith effort while participating in this vocational plan from June of 2002 through August of 2003. Additionally, the ALJ determined that claimant was putting forth a good faith effort to find employment within her limitations even after withdrawing from the vocational training program. The ALJ denied respondent's request for modification of the previous ruling, finding that there has not been a change in circumstance.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[4] However, in a review and modification of an award, it is the burden of the party seeking the review and modification to establish a change in the claimant's condition from the time of the original award.[5]

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[1] Zumalt Depo., Ex. 2 at 2 & 3.

[2] R.M.H. Trans., Cl. Ex. 2.

[3] Claimant's Discovery Depo., Ex. 4.

[4] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[5] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 598 P.2d 544 (1979).

K.S.A. 44-528(a) provides a mechanism for interested parties to have the administrative law judge review a case and determine if the award should be revised. K.S.A. 44-528(a) provides as follows:

> Any award . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds . . . that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

In this instance, the Board finds that claimant's efforts, both in withdrawing from the vocational training program and the subsequent efforts to obtain employment on her own, do not constitute a good faith effort on claimant's part. Claimant's explanation for withdrawing from the vocational plan is not credible. Claimant testifies to having difficulties with her transportation. It is noted claimant sold the car either on August 8 or September 8, 2003, depending upon which date is correct on the bill of sale. However, claimant does not explain why she ceased going to class as of July 16, 2003, one day before meeting with Mr. Zumalt and conferring regarding her progress in the training program. There was no discussion with Mr. Zumalt at that time of claimant's intention to stop going to class. In fact, Mr. Zumalt was not advised that claimant had ceased going to class for several weeks thereafter. Additionally, claimant did not even advise her attorney for several weeks that she had ceased going to class.

The Board further notes that claimant's attempts to obtain employment on her own do not appear to constitute a good faith effort to find employment. Claimant's list of job contacts included only fifty-seven names over a 38-week period. This averages to only one and a half contacts per week, which in this case does not constitute a good faith effort to obtain employment.

As noted above, the burden of proof is on the party seeking review and modification to establish a change in the claimant's condition from the time of the original award. Here, the focus is not on claimant's physical condition. Rather the focus is on whether the facts and circumstances surrounding claimant's withdrawal from the job placement plan and subsequent personal job search constitute a change in claimant's condition. The Board finds that there has been a material change in circumstances, as claimant's training and job search efforts, which originally were found to be in good faith, are no longer so.

Under *Copeland*,[6] if it is determined that a good faith effort has not been put forth by claimant, then it is the responsibility of the finder of fact to impute a wage based upon claimant's ability to earn wages. Mr. Zumalt provided an expected post-injury wage between $6.90 and $13.12 per hour. As claimant failed to complete the training program, the Board does not believe those wages to be appropriate in this circumstance. However, the Board does find that claimant has the ability to earn $6 an hour, as was originally opined by Karen Crist Terrill, a vocational rehabilitation expert, who testified before the original Award was issued.[7] The Board, in finding that claimant has not put forth a good faith effort to obtain or retain employment, will impute to claimant the $6-an-hour wage set forth by Ms. Terrill. This results in claimant having a current wage earning ability of $240 per week, which, when compared to her stipulated pre-injury average weekly wage of $446.33, results in a wage loss of 46 percent.

In the original Award, it was determined that claimant had suffered a 57 percent loss of tasks pursuant to K.S.A. 44-510e. No additional evidence was provided through the review and modification proceeding to support a finding that this task loss percentage has changed. The Board will average claimant's 46 percent wage loss with a 57 percent task loss, resulting in a 51.5 percent permanent partial general disability pursuant to K.S.A. 44-510e. The Board, therefore, modifies the Review And Modification Of An Award issued by the ALJ to award claimant a 51.5 percent permanent partial general disability. K.S.A. 44-528(d) allows for review and modifications of awards to be effective as of the date that the increase or diminishment actually occurs, with the limitation that such modification shall not be effective more than six months prior to the date of the application. In this instance, the review and modification was filed September 19, 2003, with the original Award being issued August 5, 2003. The Board, therefore, finds that this modification shall be effective as of August 6, 2003, the effective date of the Award.[8]

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review And Modification Of An Award issued by Administrative Law Judge Nelsonna Potts Barnes dated September 9, 2004, should be, and is hereby, modified to reduce claimant's permanent partial disability and award claimant a 51.5 percent permanent partial general disability effective August 6, 2003.

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[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] The original Award was issued on August 5, 2003.

[8] K.S.A. 44-525(a).

Claimant is entitled to 213.73 weeks of permanent partial general disability compensation at the rate of $297.57 per week totaling $63,599.64.

As of February 28, 2005, claimant is entitled to 173.29 weeks of permanent partial general disability compensation at the rate of $297.57 per week in the sum of $51,565.91, for a total due and owing of $51,565.91 which is ordered paid in one lump sum minus any amounts previously paid.

Thereafter, the remaining balance of $12,033.73 shall be paid at the rate of $297.57 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the Review And Modification Of An Award that are not inconsistent with the above findings and conclusions.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director